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R. v. Jarvis and Privacy in Public

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Prior to the 21st century, it was an expensive and technical proposition to surreptitiously video record people in public. Video recording devices were typically bulky, costly and required some technical expertise.

Due to the proliferation and increasing sophistication of communications technologies – in particular, mobile phones – the ability to record others is now in the hands of almost the entire adult population. As a result, social norms – and legal principles – are changing along with these dynamic and evolving technologies. Importantly, the Supreme Court of Canada has confirmed that, contrary to what some may believe, people can have a right to privacy in a "public space".

In February 2019, the Supreme Court of Canada released its decision *R. v. Jarvis*, 2019 SCC 10 ("*Jarvis*"), a criminal case involving charges of voyeurism. These reasons should be read and understood by anyone involved in "surveillance" or recording people – even in public places – as the court set out guidelines with respect to expectations of privacy and the collection and use of images and recordings taken of people in public spaces.

R. v. Jarvis

Jarvis concerned a high school teacher charged with voyeurism contrary to s. 162(1)(c) of the *Criminal Code*. That provision states:

> Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if
>
> …
>
> (c) the observation or recording is done for a sexual purpose.

Mr. Jarvis had used a camera concealed in a pen to record female students at the school where he worked. He filmed them while they were engaged in typical activities in common areas of the school, such as classrooms and hallways. Most of the videos focused on the faces and chests of the students.

At trial, Mr. Jarvis was acquitted because the judge was not satisfied the recordings were made for a sexual purpose. This finding was reversed on appeal, since all three appellate judges were of the view Mr. Jarvis' purpose was sexual. However, two of the three judges did not think the students had a "reasonable expectation of privacy" (as required under s. 162(1)) because they were in a public space, and were clearly aware that Mr. Jarvis was in a position to view them (although they were unaware of the recording). The Crown appealed this decision to the Supreme Court of Canada.

At the Supreme Court of Canada, the sole issue was whether the appellate court was right on this point – did the students have a reasonable expectation of privacy even though they were in the school's common areas when they were filmed?

The Court observed that "privacy" is a difficult concept to define. It roughly means freedom from unwanted scrutiny, intrusion, or attention, but precisely defining its parameters is challenging.

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As to "privacy in public" the Court concluded individuals <u>do not lose</u> all their expectations of privacy by walking out their front door. The Court provided a few examples where an invasion of privacy could occur even if someone was in "public": upskirt images of women on public transit; high-resolution photographs taken by a drone of unsuspecting sunbathers at a public pool; or surreptitiously recording a woman breastfeeding in the quiet corner of a coffee shop.

The Supreme Court of Canada concluded the students in this case did have a reasonable expectation of privacy and provided nine principles guiding an analysis as to whether an individual in public may have such an expectation:

1. The location a person is in: has the person sought to exclude other people and would they feel confident they were unobserved?
2. Whether the conduct amounts to observation or recording: since recording is more intrusive than observation (as discussed below), a person may have different expectations regarding whether she will be recorded in a particular situation.
3. Whether the person has consented to the observation or recording.
4. How the observation or recording was done: was it brief or protracted and whether it was enhanced by technology.
5. The subject matter of the observation or recording: what activity was the person engaged in and was there any focus on a particular body part?
6. Any rules, regulations, or policies that governed the observation in question.
7. The relationship between the parties: was the observing party in a position of power or trust?
8. Why was the observing or recording done?
9. Whether the observed person was a child or young person may also be relevant.

The Court stressed these principles were non-exhaustive and the issue is contextual and will require a consideration of the circumstances in totality.

In *Jarvis*, the Court had no difficulty finding the young female students had a reasonable expectation of privacy in the circumstances. Each of the factors the Court enumerated suggested so: Mr. Jarvis was a teacher who the underage students would have trusted and the school policies expressly prohibited him from making the recordings; furthermore, he had made recordings focused on the girls' breasts for a sexual purpose without their consent.

Indeed, the Court was so troubled by Mr. Jarvis' conduct that the Court commented: "I would likely have reached the same conclusion even if they had been made by a stranger on a public street".

It is worth noting the Court emphasized the potential invasiveness of surreptitious recording rather than mere observation. The Court commented that since the girls were in public, they could not have expected they would not be observed. However, the recordings would permit more than mere observation – the videos could be replayed, manipulated, shared with others, or studied in minute detail. The Court compared this to Mr. Jarvis staring at the "students' breasts while standing directly beside them for long stretches of time". Clearly, in those circumstances the young girls would feel their privacy invaded and report him to the school authorities.

Lessons From *Jarvis*

Although *Jarvis* was a criminal prosecution for voyeurism, the Supreme Court's comments on "privacy in public" are important to privacy law in general, not just criminal cases. Here in British Columbia, B.C.'s *Privacy Act*, provides that an invasion of privacy is a civil tort, meaning a person whose privacy has been violated can bring a lawsuit seeking damages. Given the similar language in the *Privacy Act* and s. 162 of the *Criminal Code*, a B.C. court would likely look to *Jarvis* for guidance if invasion of privacy were alleged in a civil suit.

In fact, British Columbia cases have already considered and found "surveillance", even in the context of a personal injury lawsuit, to be a potential violation of privacy. Considering such cases in light of *Jarvis* suggests they could be assessed differently today.

In *Milner v. Manufacturers Life Insurance Co.*, 2005 BCSC 1661 – decided before *Jarvis* – the plaintiff sought disability benefits from the defendant insurer due to chronic fatigue syndrome. The insurer hired private investigators and obtained video evidence of her acting inconsistently with her alleged disability. In court, Ms. Milner sought entitlement to disability benefits but also alleged the surveillance of her family amounted to a breach of privacy.

Much of the video surveillance collected related to Ms. Milner. However, some of the video footage also included the plaintiff's daughter and her daughter's friend spending time in their family living room. This footage was taken from outside of the plaintiff's house, in the evening with lights on and curtains open.

In its decision, Ms. Milner was found to not have a reasonable expectation of privacy with respect to surveillance taken from the street, since her blinds were open and anyone could have seen her while walking by her house. In addition, the insurer had a legitimate lawful interest in conducting the surveillance of her, and by starting a lawsuit putting her health at issue, her "reasonable expectation of privacy" was reduced.

However, since her daughter had not started a lawsuit putting her health at issue and was not subject to the insurance investigation, it was found the daughter did have a reasonable expectation that she would not be videotaped at home, even though the blinds were open.

In the circumstances, the Court found the daughter's privacy was violated by the surveillance. However, since she was not a party to the case, the Court declined to award damages; in the event the case went to appeal, the Court observed it would have ordered damages in the amount of $500.

The Court also dismissed an alleged breach of privacy for surveillance taken of Ms. Milner's sons playing soccer – finding the sons were in public and accordingly "had no reasonable expectation of privacy in the circumstances."

While *Jarvis* does not necessarily suggest the surveillance of Ms. Milner or her daughter would be treated differently today, the same cannot necessarily be said for the surveillance of the sons.

The fact that the sons were "in public" may no longer serve as a blanket defence to an alleged invasion of privacy. In fact, the principles articulated in *Jarvis* strongly suggest such surveillance could be much closer to the line today than it was at the time.

Best Practices

Not every aspect of the *Jarvis* decision will be relevant to the conduct of surveillance – rarely, if ever, will an investigator be in a position of power and trust akin to a teacher. It is further worth noting the Court's examples of potential breaches of "privacy in public" mostly concerned nudity and/or voyeuristic behavior.

Nonetheless, investigation and surveillance will always involve judgment calls. A few of *Jarvis*' principles may provide guidance when tough decisions inevitably arise. In our view, if an investigator were questioning whether her or his surveillance could breach an individual's right to privacy even though that individual is in public, the following may be worth considering:

- Are there rules, policies, or laws that would prohibit this form of public surveillance?
- Is the target's activity observed or recorded relevant to the investigation?
- Are other parties not under investigation being observed or recorded as well? Is the recording of other parties necessary?
- Lastly, given the concerns expressed by the Court regarding the powers of recording technology, if you have concerns as to whether surveillance could be invasive, it may be best to err on the side of observing, rather than recording, a target.

Drummond's litigation practice is focused on commercial and construction disputes. He has advised clients on a wide range of commercial matters and has experience representing insurers in insurance fraud cases. He regularly assists senior counsel in defending civil actions brought against accountants, architects, and engineers.

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